

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NEELAM BHATIA,)	Case No. CV 15-4151-RGK (JPR)
)	
Petitioner,)	
)	ORDER TO SHOW CAUSE
vs.)	
)	
STATE OF CALIFORNIA,)	
)	
Respondent.)	
)	

On June 3, 2015, Petitioner filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, challenging her conviction for grand theft. (Pet. at 2.) The Petition appears to raise five claims, including ground five, which asserts that "Detective Tapia lied on the stand when testifying."¹ (Id. at 5-6.)

Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless a petitioner has exhausted the remedies available in state

¹ Each of Petitioner's claims except ground five says only "See Exhibit A," which is a copy of portions of her Petition for Review in the California Supreme Court. Exhibit A lists six claims (Pet., Ex. A at 2-3), however, and it is unclear which four of these claims she raises in the Petition in addition to the claim concerning Detective Tapia.

1 court.² Exhaustion requires that the petitioner's contentions
2 were fairly presented to the state courts, Ybarra v. McDaniel,
3 656 F.3d 984, 991 (9th Cir. 2011), and disposed of on the merits
4 by the highest court of the state, Greene v. Lambert, 288 F.3d
5 1081, 1086 (9th Cir. 2002). As a matter of comity, a federal
6 court will not entertain a habeas petition unless the petitioner
7 has exhausted the available state judicial remedies on every
8 ground presented in it. See Rose v. Lundy, 455 U.S. 509, 518
9 (1982). A federal court may raise the failure-to-exhaust issue
10 sua sponte and summarily dismiss on that ground. See Granberry
11 v. Greer, 481 U.S. 129, 134-35 (1987); Stone v. City & Cnty. of
12 S.F., 968 F.2d 850, 856 (9th Cir. 1992) (dictum).

13 Petitioner acknowledges that ground five has never been
14 presented to the California Supreme Court (see Pet. at 7 (stating
15 that claim was not previously raised because she was advised by
16 her appellate attorney that "only mistakes committed are
17 appealed")); in contrast, it appears that all other grounds have
18 been exhausted in a Petition for Review before the California
19 Supreme Court (id. at 5-7). Ground five therefore is
20 unexhausted, and her inclusion of that claim renders the Petition
21 a "mixed petition," containing both exhausted and unexhausted
22 claims. Such petitions must generally be dismissed. See Rose,
23 455 U.S. at 522.

25 ² A habeas petition "shall not be granted unless it appears
26 that - (A) the applicant has exhausted the remedies available in
27 the courts of the State; or (B)(i) there is an absence of available
28 State corrective process; or (ii) circumstances exist that render
such process ineffective to protect the rights of the applicant."
28 U.S.C. § 2254(b)(1).

1 In certain "limited circumstances," a district court may
2 stay a mixed petition and hold it in abeyance while the
3 petitioner returns to state court to exhaust any unexhausted
4 claims. See Rhines v. Weber, 544 U.S. 269, 277 (2005). Under
5 Rhines, the prerequisites for obtaining a stay while the
6 petitioner exhausts her state remedies are as follows: (1) the
7 petitioner must show good cause for her failure to earlier
8 exhaust the claim in state court, (2) the unexhausted claim must
9 not be "plainly meritless," and (3) the petitioner must not have
10 engaged in "abusive litigation tactics or intentional delay."
11 Id. at 277-78.

12 Petitioner acknowledges that ground five is unexhausted but
13 does not fully explain why she did not earlier raise the claim,
14 which appears to concern a matter she knew about at the time of
15 trial. Moreover, because the claim is wholly conclusory as
16 presented, it appears to be "plainly meritless." Indeed, because
17 she states that her attorney "should have objected" to the
18 detective's testimony (Pet. at 7), it is not clear whether she
19 seeks to raise an ineffective-assistance-of-counsel claim or some
20 kind of prosecutorial misconduct or Napue claim.³ Thus, it is
21 unclear from the face of the Petition whether Petitioner can meet
22 the Rhines requirements.

23 IT THEREFORE IS ORDERED that within 21 days of the date of
24 this Order, Petitioner do one of the following: (1) file a formal
25

26
27 ³ See Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding
28 that "a conviction obtained through use of false evidence, known to
be such by representatives of the State," violates defendant's
right to due process under 14th Amendment).

1 stay-and-abey motion if she believes she can make the required
 2 showings under Rhines; (2) voluntarily dismiss the Petition
 3 without prejudice under Federal Rule of Civil Procedure 41(a)(1),
 4 with the understanding that any later petition may be time barred
 5 under § 2244(d)(1); (3) voluntarily dismiss ground five of the
 6 Petition and elect either to proceed on the exhausted claims –
 7 which she must specifically identify – or seek a stay of the
 8 fully exhausted Petition under Kelly v. Small, 315 F.3d 1063 (9th
 9 Cir. 2003) (as amended) (allowing for stays of fully exhausted
 10 federal petitions without showing of good cause), overruling on
 11 other grounds recognized by Robbins v. Carey, 481 F.3d 1143, 1149
 12 (9th Cir. 2007), with the understanding that she will be allowed
 13 to amend any newly exhausted claim back into the Petition only if
 14 the claim is timely or “relates back” to the original claims; or
 15 (4) show cause in writing why this action should not be dismissed
 16 without prejudice for failure to exhaust state remedies.

17 Plaintiff is expressly warned that her failure to timely
 18 comply with this Order may result in the Petition being dismissed
 19 for the reasons stated above and for failure to prosecute.⁴

20
 21 DATED: June 12, 2015


 22 JEN ROSENBLUTH
 U.S. MAGISTRATE JUDGE

23
 24 ⁴ Petitioner has moved for appointment of counsel. Because
 25 it appears that the Petition is partially unexhausted and therefore
 26 may be dismissed, appointment of counsel is not appropriate at this
 27 time. Cf. Al'Faro v. Cullen, No. C 08-4295 SI (pr), 2010 WL
 28 4690873, at *4 (N.D. Cal. Nov. 10, 2010) (dismissing petitioner's
 mixed habeas petition and denying motion for appointment of
 counsel). Accordingly, the request is DENIED. If Petitioner
 adequately shows cause why her Petition should not be dismissed
 without prejudice, she may ask the Court to reconsider her request.